Supreme Court, U.S.
FILED
FEB 18 2009
OFFICE OF THE CLERK

12 No. (1) 081064

In The

# Supreme Court of the United States

RICHARD GLEN MILBURN,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## PETITION FOR WRIT OF CERTIORARI

ALEXANDER M. SALERNO
*Counsel of Record*
2505 S. Des Plaines Avenue
North Riverside, IL 60546
(708) 443-5400

*Attorney for Petitioner*
*Richard Glen Milburn*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTION PRESENTED

Whether a fatal variance between pleading and proof and the resultant jury finding of a lesser included offense would invalidate mandatory consecutive sentencing provisions and allow a court to fashion a reasonable sentence under 18 U.S.C. § 3553.

TABLE OF CONTENTS

Page

QUESTION PRESENTED ..... i

OPINION BELOW ..... 1

JURISDICTION ..... 1

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED ..... 1

STATEMENT OF THE CASE ..... 5

REASONS FOR GRANTING THE PETITION ..... 5

A. FACTS ..... 6

B. ARGUMENT ..... 8

C. CONFLICT WITH SUPREME COURT LAW ..... 13

CONCLUSION ..... 15

APPENDIX

Sixth Circuit Court of Appeals Opinion, filed Oct. 21, 2008 ..... App. 1

District Court Judgment in a Criminal Case, dated April 19, 2007 ..... App. 12

District Court Superseding Indictment (Relevant Portions) ..... App. 18

District Court Verdict Form ..... App. 21

# TABLE OF AUTHORITIES

Page

CASES

*Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000).....13

*Blakely v. Washington*, 124 S. Ct. 2531 (2004).....9, 14

*Booker v. United States*, 543 U.S. 296 (2004).....6, 9, 12, 14

*Reid v. United States*, 127 S. Ct. 456 (2007).....12

*United States v. Colvin*, 353 F.3d 569 (7th Cir. 2003).....11

*United States v. Johnson*, 223 F.3d 665 (7th Cir. 2000).....12

*United States v. Solorio*, 337 F.3d 580 (6th Cir. 2003).....6

STATUTES AND RULES

18 U.S.C. § 924 .....*passim*

18 U.S.C. § 3553 .....3, 12, 13

21 U.S.C. § 841 .....4, 5

CONSTITUTION

United States Constitution Amendment VI .....1, 14

## OPINION BELOW

The unpublished opinion of the United States Court of Appeals for the Sixth Circuit affirming the Petitioner's convictions is reported at *United States v. Richard Glen Milburn.*

## JURISDICTION

On October 21, 2008, the Sixth Circuit filed its opinion affirming Petitioner's convictions. The Sixth Circuit issued its mandate on October 21, 2008. On January 23, 2009, this Court extended the deadline for filing this petition to February 18, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

### Sixth Amendment to the United States Constitution

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which districts shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for witnesses in his favor, and to have the assistance of counsel for his defense."

**18 U.S.C. § 924**

(e)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime –

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection –

(i) is a short-barreled rifle, short-barreled shotgun, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machine gun or a destructive device, or is equipped with a firearm silencer or

firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall –

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machine gun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law –

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

**18 U.S.C. § 3553 Imposition of Sentence**

**(a) Factors to be considered in imposing a sentence.** The Court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed –

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for –

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines.

**21 U.S.C. § 841 Prohibited Acts**

**(a) Unlawful acts**

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally –

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

## STATEMENT OF CASE

On January 10, 2006, the Federal Grand Jury returned a twelve-count superseding indictment charging defendant and twelve co-defendants with drug trafficking and firearms offenses. The indictment charged multiple violations of 18 U.S.C. § 924(C), 21 U.S.C. § 841(B)(1), (A), (B), and (C), 846 and 28 U.S.C. § 5861(D). Various co-defendants plead guilty and some agreed to cooperate. Petitioner's trial began on December 11, 2006, and Petitioner was convicted on all counts. Petitioner then filed post trial motions for acquittal and a new trial which were denied by the District Court. Judgment was entered on April 23, 2007, and Petitioner timely filed a Notice of Appeal to the Sixth Circuit Court of Appeals on April 27, 2007. The Sixth Circuit Court of Appeals affirmed the Petitioner's convictions on October 21, 2008.

## REASONS FOR GRANTING THE PETITION

This Court should grant the instant petition for the reasons provided in Supreme Court Rule 10(c). The question presented conflicts with Supreme Court Law.

In this case, the Sixth Circuit affirmed the decision in *United States v. Solorio,* 337 F.3d 580 (2003), and indicated that a defendant, who is charged with a specific offense in an indictment, is not found guilty of that offense, but is found guilty of a "lesser included offense" would still be subject to a mandatory minimum sentence as proscribed by the charged offense. The Court denied the argument that the Petitioner be sentenced under the missives of *Booker v. United States*, 543 U.S. 296 (2004) and sentenced the Petitioner to three consecutive mandatory minimum sentences.

## A. FACTS

On December 11, 2006, Petitioner, Richard Milburn, proceeded to trial on the indictment before a jury. At trial, co-defendant, Mark Saults, and co-defendant, Thomas Turner, along with numerous other individuals, testified pursuant to deals with the government. Defendant Saults who was more culpable than Petitioner, was sentenced to 82 months. Petitioner was sentenced to 480 months, in essence a life sentence. The Petitioner argued at sentencing that he suffered two near fatal heart attacks, complete mental breakdown, chronic back pain, hypertension, high cholesterol and medical maladies that will certainly result in him dying in prison.

Saults testified in this case, that on December 1, 2005, he and Petitioner met with Thomas Turner at a BP station in Washington County, Tennessee. The

purpose of the meeting was to pay cooperating witness Turner for quantities of marijuana and methamphetamine pursuant to previous negotiations undertaken by Saults. The negotiations between Turner and Saults were intercepted by the government pursuant to the agreement of Mr. Turner who gave the government authority for consensual overhears. Mr. Saults and the Petitioner were arrested during the course of that recorded transaction. $36,000 was seized from Saults on the scene, and two (2) pistols were recovered, one from the Petitioner and one from his vehicle. At the time of that arrest, the government seized other items including a notebook, a scale and de minimus amounts of drugs that were introduced at trial. Testimony by cooperating witnesses lead to determinations that the transaction for which Petitioner was arrested was for 50 pounds of marijuana. Without corroboration, Saults claimed that he had sold Petitioner approximately 25 pounds of marijuana per week from 2001 through 2005, and Saults further stated that "in 2002 and 2003," he began purchasing methamphetamine from the Petitioner at the purported rate of 1 gram per week. The arrest on December 1, 2005, also included a negotiation for two pounds of methamphetamine.

Further testimony from cooperating witness Troy Ward indicated that he went to Georgia on a separate occasion in September of 2004 with the approval of Petitioner. He claimed that the purpose of the trip was to obtain "a quarter pound" of methamphetamine. Ward claimed that the money was fronted by

Petitioner and was then stolen by "a Mexican named Julio." Ward stated that Petitioner then traveled to Georgia to provide Ward with additional money to complete the drug transaction. Petitioner was arrested in a motel room in Marietta, Cobb County, Georgia, on September 8, 2004. According to Officer Moore of the Cobb County Police Department, Petitioner was not even a subject of the drug investigation being undertaken by the Smyrna Organized Crime Task Force. The individual under investigation was one Jeremy Scott. In the process of investigating, agents knocked at the door of Room 322 of the Hometown Inn in Marietta, Georgia. Officers entered the room, arrested Petitioner and his wife, and seized a scale and approximately 37.25 grams of methamphetamine. Cash and pistols were also seized. This Georgia offense was joined into Petitioner's indictment and while the Petitioner argued a motion to dismiss based upon improper venue, those charges were tried along with the instant indictment and the Petitioner was found guilty.

## B. ARGUMENT

In Count 1, the Petitioner was charged under 21 U.S.C. § 846 with a Conspiracy to Distribute and to Possess with the Intent to Distribute Marijuana, in an amount in excess of 1,000 kilograms. The jury found the Petitioner guilty, however unanimously and beyond a reasonable doubt, also found that the amount of marijuana the Petitioner conspired to distribute and to possess was actually 100 kilograms or more,

but less than 1,000 kilograms. The verdict forms and instructions went on to explain that if the jury found the Petitioner guilty of Count 1, the jury should then consider Counts 5 and 9. Counts 5 and 9 charged the Petitioner under 18 U.S.C. § 924(c)(1) with carrying a firearm during and in relation to a drug trafficking offense **AS** charged in Count 1 (emphasis added). Although the jury did not find the Petitioner guilty as charged in Count 1, the jury found the Petitioner guilty of Count 5 and Count 9 using and carrying a weapon during the commission of Count 1 as charged in the indictment. The Petitioner was then sentenced to 480 months in violation of this Court's opinion in *Booker* and *Blakely v. Washington*, 124 S. Ct. 2531 (2004).

There was a fatal variance between the pleading and proof on Count 1, therefore the lower Court was required to invalidate that Count. In the alternative, Petitioner urges that the consecutive 924(c) counts should have been stricken for sentencing purpose and that the Petitioner should have been sentenced to the minimum mandatory sentence of 120 months. The variance attendant to the jury verdict mandated dismissal of the Count from sentencing consideration. Indeed, notwithstanding the quite precise amounts charged in Count 1 (Conspiracy to Possess with Intent to Distribute 1,000 Kilograms or more), Petitioner urges that the jury returned a legally inconsistent verdict conflicting the superseding indictment itself. The jury found that the amount of marijuana the Petitioner conspired to distribute and to possess

with the intent to distribute was "100 kilograms or more but less than 1,000 kilograms." The indictment charged a conspiracy of more than 1,000 kilograms of marijuana. This was a fatal variance of the conduct charged in Count 1 and was effectively a finding of not guilty as to Count 1. Free of the need to impose the unconscionable 40-year minimum mandatory sentence, the Petitioner contends that the Court was free to impose a sentence far less than the proposed series of minimum mandatory consecutive terms and no more than the guideline range of 120 months (the Petitioner bases his 120-month sentence projection upon the mandatory minimum 120-month terms prescribed under Counts 2 and 7 of his conviction).

In assessing a 480-month mandatory minimum sentence, the Pre-Sentence Investigation Report in this case indicated that the Petitioner had been charged with and found guilty of a conspiracy to distribute 100 kilograms but less than 1,000 kilograms of marijuana. Contrary to the Pre-Sentence Investigation Report, the government never charged a conspiracy to distribute and possess with the intent to distribute over 100 kilograms but less than 1,000 kilograms of marijuana. The Petitioner was charged with distribution and possession of more than 1,000 kilograms of marijuana. That fatal variance is the linchpin of this Court's ability to invalidate the conviction on Count 1 and accordingly invalidate the minimum mandatory consecutive provisions of Counts 5 and 9, which are successive and premised upon one another and derivatively upon Count 1.

Count 5 charged a violation of carrying a firearm during and in relation to a drug trafficking offense in violation of 18 U.S.C. § 924(c). Count 9 similarly charged a violation of carrying a firearm during and in relation to a drug trafficking offense in violation of 18 U.S.C. § 924(c). Notwithstanding the precise amounts charged in Count 1, the jury returned a legally inconsistent verdict based upon a finding other than that alleged within the government's charging document, the superseding indictment itself. The jury found that the amount of marijuana the Petitioner conspired to distribute and to possess with the intent to distribute was 100 kilograms or more but less than 1,000 kilograms. This was effectively a finding of not guilty as to Count 1. Prior to finalized jury instructions, the following language was approved as to the element instruction for both firearm use counts: "that carrying a firearm was during and in relation the drug trafficking crime as charged in the indictment."

When a jury returns a general verdict that may have rested on invalid ground, an Appellate Court will reverse if it cannot be determined whether the verdict rest on a proper or improper ground. *United States v. Colvin*, 353 F.3d 569, 576, 577 (7th Cir. 2003) (Majority held that the crime of murder for hire requires at least two guilty participants, the first jury's rejection of the murder for hire factor was logically inconsistent with the second jury's endorsement and that the logical inconsistency rendered the second conviction and death sentence

unconstitutional). That is precisely the case here. Moreover, "with the inconsistencies are such as to indicate that the jury verdict was a product of irrationality, the verdict must be set aside." *United States v. Johnson*, 223 F.3d 665 (7th Cir. 2000). Once invalidated, both Section 924(c) counts must fall for sentencing purposes as well.

The sentencing Court felt it could not rely on the factors enunciated in *Reid v. United States*, 127 S. Ct. 456 (2007) or *Booker v. United States*, 543 U.S. 220 (2005) and 18 U.S.C. § 3553. The Petitioner had an extensive background as a faithful law-abiding farmer and a citizen who had never been arrested in the past. The Petitioner argued that he should be given a fair sentence under the factors of Section 3553(a) and not the mandatory minimum as the lower Court felt it was required to apply. The Petitioner brought forth overwhelming support of family, friends and community in the form of letters and his history and characteristics, people who worked with him in the past, people who worked in projects with him and people who knew the Petitioner was a hard working, faithful law-abiding citizen. The record indicated that the Petitioner grew up rural and relatively poor, married and became a vital part of his community. He was a member of the Milburnton Methodist Church and worked from dusk to dark until such time as he was almost unable to walk by virtue of his steadily declining medical condition and his injuries suffered at the time he was thrown off a horse. It was the erroneous belief by the Court below

that the Petitioner was ineligible for consideration under the guideline factors enunciated in § 3553 because of the erroneous conviction that led the Court to believe that he was only entitled to a 480-month sentence.

## C. CONFLICT WITH SUPREME COURT LAW

The sentence imposed in this case and the conclusion of the court is contrary to this Court's enunciated decisions. In *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000), this court ruled "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proven beyond a reasonable doubt." Further "the statutory maximum for *Apprendi* is based *solely* on facts reflected in the jury verdict (emphasis added). The jury verdict on this case did not support a mandatory 480-month maximum sentence. The jury found the defendant guilty of a lesser included offense. The jury did not find the defendant guilty of the conspiracy **AS** charged in the indictment. The lower court decided that the fatal variance was merely a finding on a lesser included offense, and not a fatal variance or a finding of not guilty. However, "the characterization of a fact or circumstance as an 'element' or 'sentencing question' is not determinative of the question of who decides, judge or jury."

**The jury did not determine that Petitioner committed the acts as alleged in Count 1**, but the

court still sentenced the defendant to the mandatory minimum for the 924(c) counts. "The defendant has the right to have 'any particular fact' determined by a jury, that right is implicated any time a judge seeks to impose a sentence not solely based on facts reflected in the jury verdict or admitted by the defendant." *Blakely v. Washington*, 124 S. Ct. 2531 (2004). "The court below should not have looked past the specific finding of the jury. It is a defendants right to a lesser sentence absent additional fact finding that makes all the difference under the 6th Amendment." *Id.*

*Booker v. United States*, 543 U.S. 296 (2004) held that the Sixth Amendment requires a jury to decide beyond a reasonable doubt any fact that increases the sentence of the Defendant in a criminal case. The Petitioner was sentenced to a mandatory 480 months on a finding of not guilty. Succinctly put, the defendant was not found guilty of the offense as charged in Count 1 in the indictment; therefore, the defendant would not be eligible for the mandatory successive consecutive sentences under the 924(c) counts because they were based in whole on the defendant being convicted of carrying a firearm **during the commission of the offense as charged in Count 1**. Since he was not guilty as charged, he could not have carried a firearm during the commission of the offense. To allow the Sixth Circuit Court opinion to stand would contradict established Supreme Court precedent and would result in the Petitioner being sentenced an additional

360 months for an offense for which he was not found guilty.

## CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

ALEXANDER M. SALERNO
*Counsel of Record*
2505 S. Des Plaines Avenue
North Riverside, IL 60546
(708) 443-5400
*Counsel for Petitioner*
*Richard Glen Milburn*

**NOT RECOMMENDED FOR FULL-TEXT PUBLICATION**

No. 07-5617

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

United States of America
*Plaintiff-Appellee*,

v.

Richard Glen Milburn
*Defendant-Appellant.*

On Appeal from the United States District Court for the Eastern District of Tennessee

(Filed Oct. 21, 2008)

Before: KENNEDY, SUTTON, and McKEAGUE, Circuit Judges.

**KENNEDY, J.** Richard Milburn appeals his convictions for various drug- and firearm-related offenses. He raises three arguments on appeal: (1) venue is improper as to the drug and firearm offenses relating to his arrest in Georgia; (2) the variance between the quantity of marijuana charged and the amount determined in the jury's verdict on Count One is impermissible and should result in the dismissal of that count; and (3) the district court failed to consider fully all factors underlying the application of a reasonable sentence. For the following reasons, we AFFIRM the judgment of the district court.

## BACKGROUND

Milburn's multiple-count indictment and conviction was based on two somewhat independent series of events involving his narcotics dealings. Milburn was arrested at a hotel in Georgia on September 8, 2004, and on a separate occasion, Milburn was arrested at a gas station in Tennessee on December 1, 2005.

Milburn traveled to Georgia after leaving Tennessee with cash to purchase methamphetamine from a contact of Troy Ward, an acquaintance. J.A. at 312. Ward had done drugs at Milburn's house and Ward was involved with an associate of Milburn's by the name of Mark Saults. J.A. at 305. Saults had bought methamphetamine from and sold marijuana to Milburn. J.A. 181-83. In September of 2004, Milburn asked Ward to purchase methamphetamine in Georgia from a drug dealer known to Ward only as "Julio" and bring it back to Tennessee. J.A. at 310. Milburn met Ward in Baileyton, Tennessee – in the Eastern District of Tennessee – and gave Ward $5,400 in cash for the methamphetamine and $100 for gas money. J.A. at 308. Ward took that money to Georgia that night and gave Julio $4,200 of Milburn's cash to purchase a quarter pound of methamphetamine. J.A. at 311. Julio took the money and never returned. J.A. at 311. Ward then called Milburn, told him what happened with Julio, and indicated that he had found another source for methamphetamine. J.A. at 311-12. Milburn decided to go to Georgia from Tennessee himself with between $10,000 and $12,000 in cash to

purchase more methamphetamine from Ward's contact. J.A. at 312. Milburn met Ward at the hotel and they were arrested. The police officers searched the room and Milburn's person and found 37.25 grams of methamphetamine, cash, three guns, and digital scales. Both Count Four, attempt to possess with the intent to distribute methamphetamine in violation of 21 U.S.C §§ 846 and 841(b)(1)(C) and 18 U.S.C. § 2, and Count Five, carrying a firearm during and in relation to a drug trafficking offense in violation of 18 U.S.C. § 924(c)(1), arise out of this series of events.

Police arrested Milburn in Tennessee during a drug deal between Milburn and Saults on one side, and Thomas Turner on the other. Turner was a former drug trafficker who now worked for the police. J.A. at 276. Turner set up a deal to sell methamphetamine and marijuana to Saults, but Saults did not have the money to purchase the drugs, so Milburn agreed to buy the drugs. J.A. at 189-90. Saults would sell part of the drugs purchased by Milburn, and then Saults would use the proceeds to repay Milburn and they would split the profit. J.A. at 191. On December 1, 2005, Turner met with Saults and Milburn at a gas station in Boones Creek, Tennessee where the police were waiting. J.A. at 222. Turner gave the signal and the police arrested Saults and Milburn on the spot. J.A. at 223. In searching Milburn's pickup truck and his person, officers discovered methamphetamine, tens of thousands of dollars in cash, two guns, digital scales with drug residue, a methamphetamine pipe, methlsulfonal monohydrate

(used to dilute methamphetamine), and a drug ledger. J.A. at 224-31. Count Six, attempt to possess with the intent to distribute marijuana in violation of 21 U.S.C. §§ 846 and 841(b)(1)(D) and 18 U.S.C. § 2; Count Seven, attempt to possess with the intent to distribute 50 grams or more of methamphetamine in violation of 21 U.S.C. §§ 846 and 841(b)(1)(A) and 18 U.S.C. § 2; Count Eight, possession with the intent to distribute methamphetamine in violation of 21 U.S.C. §§ 846 and 841(b)(1)(C); and Count Nine, carrying a firearm during and in relation to a drug trafficking offense in violation of 18 U.S.C. § 924(c)(1) all arose out of the events relating to Milburn's arrest in Tennessee.

Counts One and Two dealt with conspiracy to distribute and possession with the intent to distribute marijuana and methamphetamine, respectively, arising out of the events leading up to both arrests mentioned above – in addition to other dealings – between approximately January 1995 and December 13, 2005. J.A. at 46, 54. Count Ten, possession of an unregistered short barreled firearm in violation of 26 U.S.C. § 5861(d), came out of the discovery of a sawed-off shotgun during a lawful search of Milburn's house. The last count, Count Eleven, was for possessing contraband in prison.

In the district court, Defendant filed a motion to dismiss Counts Four and Five for lack of venue which the district court denied. J.A. at 71. Defendant's motion for judgment of acquittal for lack of venue was also denied by the district court. J.A. at 330. The

district court also rejected Defendant's other arguments that Count One should be stricken, Counts Five and Nine should fall with Count One, and Defendant's sentence should be adjusted accordingly. J.A. at 336-37. Convicted as to Counts One and Two and Counts Four through Eleven, Defendant was sentenced to 480 months in prison, the statutory minimum. J.A. at 344.

## ANALYSIS

### I. Venue as to Counts Four and Five

Separate analyses guide the determination of whether venue is proper for Counts Four and Five. Count Five is for carrying a firearm during and in relation to a drug trafficking offense in violation of § 924(c). Its analysis must proceed under the framework of *United States v. Rodriguez-Moreno*, 526 U.S. 275 (1999) which held that venue is appropriate for a violation of § 924(c) wherever venue is appropriate as to the underlying continuing crime. 526 U.S. at 281. As for Count Four, the underlying continuing crime, *United States v. Cabrales*, 524 U.S. 1 (1998) held that venue is appropriate wherever the offense is "'begun, continued, or completed.'" 524 U.S. at 7 (quoting 18 U.S.C. § 3237(a)).

Defendant argues that venue for the Georgia offenses is improper where "[t]he alleged offenses took place many hundreds of miles from one another," "[m]ore than one full year separated the Georgia and Tennessee offenses," and "[a]side from the fact that

both states' offenses involved generic drug charges, no other similarities existed." Def. Br. at 11. These arguments misconstrue the relationship the law focuses on for the purposes of venue as that between the charges brought against Defendant, when the real issue in consideration of venue is the relationship between the place of the criminal behavior and the place of trial. Accordingly, Defendant's arguments fail where the facts establish that the crime of attempted possession with the intent to distribute began in the Eastern District of Tennessee with a meeting between Milburn and Ward.

*United States v. Zidell,* 323 F.3d 412 (6th Cir. 2003) controls here. In *Zidell,* the defendant lived in Dallas, Texas, but he had met with his associates in Memphis, he had induced his associates to travel from Memphis to Dallas on two occasions, and his associates had taken methamphetamine from the defendant in Dallas with the aim to sell the drugs received from the defendant in Memphis and then pay the defendant back with the proceeds before they were arrested prior to their arrival in Memphis. 323 F.3d at 423. The defendant was convicted of attempt to possess with intent to distribute methamphetamine in violation of 21 U.S.C. § 846, the same crime at issue here. He argued that venue was improper in the Western District of Tennessee since "he supplied the drugs in question solely in Texas[ ] and without traveling to Memphis." *Id.* at 422. The Sixth Circuit panel in *Zidell* rejected that argument, and instead looked at a broader scope of events, indicating that

venue was established where the attempted distribution began in Memphis with the defendant's meeting with his associates, continued in Memphis because it was the point of departure for his associates, and terminated in Memphis since the defendant's associates intended to return there to sell the methamphetamine.[1] *Id.* at 423. Similarly, in the instant case, Defendant met with Ward in the Eastern District of Tennessee, Ward departed from the Eastern District of Tennessee to purchase methamphetamine in Georgia, and Ward intended to return to the Eastern District of Tennessee to deliver the drugs to Defendant for distribution.

---

[1] The court in *Zidell* also held that since "[t]he effects of the attempted distribution, if successful, would have been felt in Memphis," venue was proper under a substantial contacts test. 323 F.3d at 423. While the court in *Zidell* seemingly analyzed substantial contacts as a sufficient, alternative ground on which to find venue, 323 F.3d at 423 (following an analysis of whether venue is proper under § 3237(a), the court wrote: "[m]ore generally, we have evaluated challenges to venue under a 'substantial contacts' test . . . "), other Sixth Circuit panels have determined whether an offense was begun, continued, or completed per § 3237(a) through the application of the substantial contacts test. *See United States v. Beddow*, 957 F.2d 1330, 1335-36 (6th Cir. 1992); *see generally United States v. Williams*, 788 F.2d 1213, 1215 (6th Cir. 1986) (holding that venue generally is evaluated under substantial contacts in the Sixth Circuit). Like the United States Supreme Court in *Cabrales*, we look only at *locus delicti*, determined from "'the nature of the crime alleged and the location of the act or acts constituting it,'" 524 U.S. at 7 (quoting *United States v. Anderson*, 328 U.S. 699, 703 (1946)), which prescribes the constitutional minimums for venue of Article III, § 2, cl. 3 and the Sixth Amendment, and the statutory requirements of § 3237(a). 524 U.S. at 6-7.

Because venue for the underlying offense – here drug trafficking – is appropriate in the Eastern District of Tennessee, venue is proper for Count Five, namely the carrying of a firearm during and in relation to a drug trafficking offense in violation of 18 U.S.C. § 924(c). *See Rodriguez-Moreno,* 526 U.S. at 281-82. *Rodriguez-Moreno* held that "[w]here venue is appropriate for the underlying crime" – in *Rodriguez-Moreno* the crime was kidnaping – so too is venue appropriate "for the § 924(c)(1) offense."[2] *Id.* Therefore, venue is not improper as to both Count Four and Count Five.

## II. Variance as to Count One

Count One charged Defendant with conspiracy to distribute and possession with the intent to distribute 1000 kilograms or more of marijuana. J.A. at 47. On the verdict form, the jury checked the "Guilty" blank as to Count One, but they also checked "100 kilograms or more but less than 1000 kilograms" as to the amount of marijuana. J.A. at 80. Defendant argues that since the count itself was for 1000 kilograms or more of marijuana but the amount determined by the jury was between 100 and 1000 kilograms, there was a "fatal variance between pleading and proof. . . ."

---

[2] That *Rodriguez-Moreno* dealt with an underlying crime of violence – kidnaping – and the case before us deals with drug trafficking is a distinction without a difference as they are both continuing crimes that occur across geographic boundaries and § 924(c) makes carrying a gun a crime in relation to both.

Def. Br. at 2. Defendant's argument has been foreclosed by *United States v. Solorio,* 337 F.3d 580 (2003).[3]

In *Solorio,* one count of the indictment alleged that the defendant "conspired to possess with intent to distribute 5 kilograms of cocaine," but the jury found the defendant guilty of "conspiring to possess with intent to distribute 500 grams of cocaine." 337 F.3d at 589. *Solorio* is "identical" to *United States v. Vazquez,* 49 Fed. Appx. 550, 2002 WL 31367162 (6th Cir. 2002) (unpublished) which *Solorio* relies upon.[4] *Solorio,* 337 F.3d at 591. In both cases, the indictment charged the defendant with one count of conspiracy involving more than 5 kilograms under § 841(b)(1)(A); but having found the defendant guilty of that count, the jury went on to specifically find that

---

[3] Defendant also argues that, where "'inconsistencies . . . indicate that the jury verdict was a product of irrationality,' the verdict must be set aside." Def. Br. at 23 (quoting *United States v. Johnson,* 223 F.3d 665, 675-76 (7th Cir. 2000)). However, *Johnson* dealt specifically with a death penalty statute and there are no inconsistencies in the jury findings here as there were in *Johnson* where two separate jury forms which had some of the exact same questions on both the jury marked with different answers. *Id.*

[4] Although *Solorio* relied upon *Vazquez,* an unpublished opinion, the precedential value of *Solorio* is not in question because its reasoning is sound and the case is cited favorably by *United States v. Martinez,* 430 F.3d 317 (6th Cir. 2005) (holding that the defendant could be convicted on a conspiracy count even where the indictment alleged greater quantities of narcotics under § 841(b)(1)(A) than found by the jury in its special verdict which corresponded to lesser penalties under § 841(b)(1)(B)).

the defendant conspired to distribute more than 500 grams but less than 5 kilograms of cocaine, which "made out the requirements of § 841(b)(1)(B)." *Id.* Both courts held that this did not constitute a prejudicial variance nor was it a constructive amendment, both of which might have called for reversal of the district court. *Id.*

Nearly identically here, though Count One charged Defendant with one count of conspiracy involving over 1000 kilograms of marijuana under § 841(b)(1)(A), the jury found that Defendant conspired as to between 500 grams and 1000 kilograms of marijuana, making out the requirements under § 841(b)(1)(B). Then, as in *Solorio* and *Vazquez,* the jury merely convicted Defendant of a lesser offense necessarily included in the offense charged, permissible under Fed. R. Crim. P. 31(c)(1).[5] Defendant's ability to defend himself was left unaffected, which is the underlying concern of both variance and constructive amendment. *Id.* at 590.

## III. Sentencing

Defendant's remaining arguments concerning sentencing all rely upon vacating Count One. Counts

---

[5] That rule reads: "A defendant may be found guilty of any of the following: (1) an offense necessarily included in the offense charged; (2) an attempt to commit the offence charged; or (3) an attempt to commit an offense necessarily included in the offense charged, if the attempt is an offense in its own right." Fed. R. Crim. P. 31(c).

Five and Nine, Defendant argues, must be invalidated because they are premised upon Count One and the sentence should be lowered accordingly. Since Count One remains, the 480-month statutory minimum stands. Remand for sentencing is inappropriate because the statutory minimum is mandatory and a district court is not permitted to depart below it. *See United States v. Hoosier,* 442 F.3d 939, 944 (6th Cir. 2006).

IV.

For the foregoing reasons, we AFFIRM the judgment of the district court.

UNITED STATES DISTRICT COURT
Eastern District of Tennessee

| | |
|---|---|
| UNITED STATES OF AMERICA | **JUDGMENT IN A CRIMINAL CASE** |
| v. | (For Offenses Committed On or After November 1, 1987) |
| RICHARD GLEN MILBURN | Case Number: 2:05-CR-100-001 |
| | Alexander M. Salerno<br>Defendant's Attorney |

**THE DEFENDANT:**

[ ] pleaded guilty to count(s): _____
[ ] pleaded nolo contendere to count(s)_____ which was accepted by the court.
[✓] was found guilty on Counts 1,2,4,5,6,7,8,9,10,11 of the Superseding Indictment after a plea of not guilty.

**ACCORDINGLY,** the court has adjudicated that the defendant is guilty of the following offense(s):

| Title & Section | Nature of Offense | Date Offense Concluded | Count Number(s) |
|---|---|---|---|

See next page.

The defendant is sentenced as provided in pages 2 through 7 of this judgment and the Statement of Reasons. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 and 18 U.S.C. §3553.

[ ] The defendant has been found not guilty on count(s)___

[✓] Count 3 of the Superseding Indictment [✓] is [ ] are dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

April 19, 2007
Date of Imposition of Judgment

*s/ Leon Jordan*
United States District Judge
Signature of Judicial Officer

LEON JORDAN,
United States District Judge
Name & Title of Judicial Officer

4-23-07
Date

## ADDITIONAL COUNTS OF CONVICTION

| Title & Section | Nature of Offense | Date Offense Concluded | Count Numbers |
|---|---|---|---|
| 21 U.S.C. §§ 846 and 841(b)(1)(B) | Conspiracy to Distribute and Possession with the Intent to Distribute 100 Kilograms or More of Marijuana | December 1, 2005 | 1 |
| 21 U.S.C. §§ 846 and 841(b)(1)(A) | Conspiracy to Distribute and Possession with the Intent to Distribute 500 Grams or More of Methamphetamine | December 1, 2005 | 2 |
| 21 U.S.C. §§ 846 and 841(b)(1)(C) | Attempt to Possess with the Intent to Distribute Methamphetamine | December 1, 2005 | 4 |
| 18 U.S.C. § 924(c)(1) | Carrying a Firearm During and In Relation to a Drug Trafficking Offense | December 1, 2005 | 5,9 |

| | | | |
|---|---|---|---|
| 21 U.S.C. §§ 846 and 841(b)(1)(D) and 18 U.S.C. § 2 | Attempt to Possess with the Intent to Distribute Marijuana | December 1, 2005 | 6 |
| 21 U.S.C. §§ 846 and 841(b)(1)(A) and 18 U.S.C. § 2 | Attempt to Possess with the Intent to Distribute 50 Grams or More of Methamphetamine | December 1, 2005 | 7 |
| 21 U.S.C. §§ 846 and 841(b)(1)(C) | Possession with the Intent to Distribute Methamphetamine | December 1, 2005 | 8 |
| 26 U.S.C. § 5861(d) | Possession of an Unregistered Short Barreled Firearm | December 1, 2005 | 10 |
| 18 U.S.C. § 1791(a)(2) and (b)(3) | Possessing Contraband in Prison | May 23, 2006 | 11 |

**IMPRISONMENT**

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 480 months.

This sentence consists of a term of 120 months as to each of Counts 1,2,4,7,8 and 10, to be served

concurrently; a term of 60 months as to each of Counts 6 and 11, to be served concurrently; a term of 60 months as to Count 5, to be served consecutively to all other terms; and a term of 300 months as to Count 9, to be served consecutively to all other terms for a total effective sentence of 480 months.

[✓] The court makes the following recommendations to the Bureau of Prisons:

The court recommends that the defendant receive 500 hours of substance abuse treatment from the BOP Institution Residential Drug Abuse Treatment Program. Furthermore, the court recommends the defendant be designated to FMC Lexington, KY.

[✓] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district:

[ ] at ____ [ ] a.m. [ ] p.m. on _____.

[ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[ ] before 2 p.m. on _____.

[ ] as notified by the United States Marshal.

[ ] as notified by the Probation or Pretrial Services Office.

**RETURN**

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on 7/6/07 to AP

at Coleman, FL with a certified copy of this judgment.

/s/ Michael W. Garrett,
Complex Warden
~~UNITED STATES MARSHAL~~

By /s/ L. [Illegible]
~~DEPUTY UNITED STATES MARSHAL~~

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
GREENEVILLE

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | ) | |
| | ) | |
| V. | ) | |
| | ) | |
| VICTOR HUGO VARGAS | ) | 2:05-CR-100 |
| SIDNEY CHARLES TERRELL | ) | JUDGE GREER |
| RICHARD GLEN MILBURN | ) | |
| JAMES FRANKLIN DEVOTIE | ) | |

SUPERSEDING INDICTMENT

COUNT 1

The Grand Jury charges that beginning approximately the month of January, 1995, and continuing to on or about December 13, 2005, within the Eastern District of Tennessee, and elsewhere, the defendants, VICTOR HUGO VARGAS, SIDNEY CHARLES TERRELL, RICHARD GLEN MILBURN, JAMES FRANKLIN DEVOTIE, and the following defendants named but not charged in this superseding indictment, LOUIS ANTONIO MEDINA, DOUG KEITH DAVIS, ERIC PHILLIP SHAWBACK, MICHAEL DAMON BAWGUS, MARK ALLEN SAULTS, SHANNON LUTTRELL, ROBERT ANTHONY HAMPTON, and DEREK ANTHONY KEYS, also known as TONY, TRAVIS BROWN, and other persons known and unknown to the Grand Jury did knowingly, intentionally and without authority combine, conspire, confederate and agree with each other and with diverse other persons to commit the following offenses

against the United States of America: The distribution and possession with the intent to distribute a thousand kilograms or more of a mixture and substance containing a detectable amount of marijuana, a Schedule I, controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

PURPOSE

The conspiracy consisted of the defendants VICTOR HUGO VARGAS, SIDNEY CHARLES TERRELL, RICHARD GLEN MILBURN, JAMES FRANKLIN DEVOTIE, and the following defendants named but not charged in this superseding indictment, LOUIS ANTONIO MEDINA, DOUG KEITH DAVIS, ERIC PHILLIP SHAWBACK, MICHAEL DAMON BAWGUS, MARK ALLEN SAULTS, SHANNON LUTTRELL, ROBERT ANTHONY HAMPTON, and DEREK ANTHONY KEYS, also known as TONY, TRAVIS BROWN, and other persons known and unknown to the Grand Jury whose primary purpose was to expand and promote an illegal business activity deriving profits from the illegal distribution and possession with the intent to distribute a thousand kilograms or more of marijuana.

* * *

COUNT 9

The Grand Jury further charges that on or about December 1, 2005, in the Eastern District of Tennessee, the defendant, RICHARD MILBURN, did knowingly and intentionally carry two firearms during and

in relation to a drug trafficking offense, as alleged in Counts 1, 2, 6, 7, and 8, that is, a violation of Title 21, United States Code, Sections 841(a)(1) and 846.

FORFEITURE ALLEGATION

As a result of committing the violation of Title 18, United States Code, Section 924(c), as alleged in Count 9 of this Indictment, pursuant to Title 18, United States Code, Section 924(d)(1), and Title 28, United States Code, Section 2461(c), the Defendant RICHARD GLEN MILBURN, shall forfeit to the United States all firearms and ammunition involved and used in the knowing commission of the offense of Title 18, United States Code, Section 924(c), including but not limited to his interest in the Tanfoglio Model GT27, .25 caliber pistol, serial number M05030 and the Beretta Model 92FS, 9mm pistol, serial number BER142285.

[18 U.S.C. §§ 924(c)(1), 924(d)(1), 28 U.S.C. § 2461(c)]

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT GREENVILLE

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | ) | |
| | ) | |
| v. | ) | No. 2:05-CR-100 |
| | ) | |
| RICHARD GLEN MILBURN | ) | |

**VERDICT FORM**

We, the members of the jury, find unanimously from all the evidence as follows:

1. As to **Count 1** of the superseding indictment, charging a violation of 21 U.S.C. § 846 (*conspiracy* to distribute and to possess with the intent to distribute marijuana), we find the defendant RICHARD GLEN MILBURN

____ NOT GUILTY

__✓__ GUILTY

*Only* if you have found the defendant GUILTY of Count 1, please consider the following:

1(a). We, the members of the jury, find unanimously and beyond a reasonable doubt that the amount of marijuana the defendant conspired to distribute and to possess with the intent to distribute was:

____ 1000 kilograms or more

✓ 100 kilograms or more but less than 1000 kilograms

____ less than 500 kilograms

* * *